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**Kelly, Sherry**

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**From:** Howie & Connie Muir [hcmuir@mindspring.com]  
**Sent:** Monday, October 21, 2002 6:13 PM  
**To:** Weldon Rucker; Bright, Tamlyn; Kelly, Sherry; Armstrong, Polly; Breland, Margaret; Hawley, Miriam; Maio, Linda; Olds, Betty; Shirek, Maudelle; Spring, Dona; Worthington, Kriss  
**Subject:** Regarding 1797 Shattuck Appeal on 22 October 2002

Dear Mayor and City Councilmembers,

I write to support the the neighbors around the project proposed for 1797 Shattuck Avenue, who are appealing a ZAB approval of a MND and Use Permits for it to City Council.

The ZAB acted without sufficient guidance, and thus arbitrarily, in approving this project which is too residentially dense for this neighborhood; the State Density Bonus Law has been misadministered; and the environmental circumstances pertaining to the property alone demand that a proper EIR be performed before approval. The Initial Study was inadequate to justify the approval without fuller study of not only the impacts of density, but those of the contaminants at the site.

**Residential Density**

The 1977 Master Plan did not provide a population density guideline for the area in which this project site is located, in spite of State law [Government Code Section 65302(a)]. requiring that "The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." This project application was completed on 19 April 2001, well before initial elements of the new General Plan were adopted. Thus, the 1977 Master Plan is the general plan that applies to the adjudication of this project.

Nor does the Zoning Ordinance provide guidance about the population density standards for the C-1 Zoning District in which the site of the proposed project is located.

Even if the new General Plan were applicable to consideration of this project, one finds that the project is far denser than the Land Use Element's Land Use Classifications foresaw as appropriate for this project site. The site's location is designated as "Avenue Commercial," which is anticipated to have a population density ranging from 44 to 88 persons per acre, which under the Plan is the equivalent of 20-40 units per net acre. The current proposal approved by the ZAB, with 65 units on a 19,158 square-foot lot houses the equivalent of 147 units per net acre. This density is 369% of the residential density indicated as appropriate by the General Plan.

The Staff Report to you provides no basis for how the maximum residential density for this site was determined. Why? Because there is no applicable standard provided by either ordinance or general plan. Thus, there is no legal basis for determining a density bonus under the applicable state law, Government Code Section 65915. The Planning Department has attempted to substitute building intensity ("building envelope") for population density purposes, but California courts have established that the concepts and measurements of "density" and "intensity" are *not* equivalent. To quote from the Governor's Office of Planning and Research publication, "General Plan Guidelines":

"Again, the *Twain Harte* court has provided the most complete interpretation of building intensity to date. ... **building intensity is not synonymous with population density.** Intensity will be dependent upon the local plan's context and may be based upon a combination of variable such as maximum dwelling units per acre, height and size limitations, and use restrictions."

*Ex post facto* justifications of a methodology for determining residential density are not an adequate substitution for a legal policy and implemented standard.

The City of Berkeley lacks a sufficient regulatory framework for evaluating the population density of projects or for

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calculating the basic maximum residential density of a site for the purposes of determining a density bonus under state law. That law, clearly states that the density bonus is "at least 25 percent over the otherwise maximum allowable residential density under the applicable zoning ordinance and land use element of the general plan as of the date of application by the developer to the city...." [Gov. Code Section 65915(f)].

The City cannot, therefore, justify either the density bonus, nor the excessive density of this project, and the ZAB's decision should be overturned.

**Cumulative Density Impacts under CEQA**

The 32 projects approved by the City in the last 10 years, for which I can locate data, have averaged 2.5 times the density deemed appropriate by the Land Use Classifications of the General Plan for their respective sites. This density trend appears to be maintained by some 13 pending projects. In just the past year and a half, many large and excessively dense projects have been approved, raising a question of cumulative impacts rising far beyond those reasonably foreseen by the Environmental Impact Report prepared in support of the General Plan. The list of recently approved and pending projects would include the following:

Address	Date Approved	No. of Units	Equivalent Density (units / acre)	G.P. Guidelines (units / acre)	Excess Density
1719-25 University	4/26/01?	29	135	40	337%
1392 University	7/24/01	71	140	40	350%
2020 Kittredge	10/11/01	176	148	100	119%
2616-20 Telegraph	1/10/02	20	101	40	252%
2517 Sacramento	5/28/02	40	98	40	245%
2700 San Pablo	7/23/02	35	91	40	227%
2451-71 Shattuck	7/23/02	100	174	40	435%
2119 University	7/23/02	44	141	100	141%
2006 University	?	32	182	100	182%
	Date Proposed				
1607 Shattuck	1/11/00	35	123	40	308%
2577 San Pablo	2/26/02	28	168	40	420%
2628 Telegraph	4/3/02	16	100	40	251%
1950 MLK Jr	9/11/02	197	196	40	490%

These densities are dramatically in excess of the General Plan guidelines and the assumptions of its EIR. They are a portion of the evidence that suggests that the City is abusing its discretionary powers by proceeding with ad hoc density evaluations, which are consistently well above the General Plan guidelines. It is unavoidable that there should be a cumulative impact examined (in an EIR) under CEQA before proceeding. Density in excess of

that for which the City is planning, will have direct and indirect consequences for a wide range of infrastructure and public services, not the least of which includes traffic, parking, sewers, schools, police, health, fire, seismic preparedness, and so on.

### **Design Review Committee Process**

The Design Review Committee (DRC) has no guideline that pertains to the C-1 Zoning District in this area. The only guideline I am aware of is one for the "downtown." Thus, it would appear that, in spite of Section 23E.08.020.A ("The design review process and the design guidelines apply to development within all areas designated as commercial, manufacturing, mixed use and all other non-residential Districts in this Ordinance and to all commercial and mixed use projects in the R-4 District."), it could not have been possible for the Committee to fulfill their obligation to apply the design review standards stipulated by Section 23E.08.020.A, because such guidelines as referred to in Section 23E.08.040\* do not exist for the project area. Thus, pursuant to Sections 23E.08.010.E ("No building or sign permit may be issued, except in conformance with this Chapter.") and 23E.12.070 ("Staff shall review all building permit applications subject to design review for compliance with the approved design review plans or conditions."), it was not possible to issue a building permit for 2517 Sacramento Street.

### **Notice for ZAB's Public Hearing**

It must be observed that the notice provided for the ZAB hearing was both technically flawed. Notice was not posted at the bulletin board at the Zoning Counter in accordance with Berkeley Municipal Code section 23B.32.020.C. Nor was notice posted under the heading "Mitigated Negative Declaration" on the Zoning Counter bulletin board. This problem is systemic, for the Planning Department appears never to post notice on the referenced bulletin board in conformance with ordinance, thereby depriving the general public of even this minimal public noticing method. Instead, notices evidently lurk in a binder tucked around the corner from where the public business is generally conducted, and thus virtually invisible to those not "in the know." This is completely contrary to the intention and spirit of public notice.

### **Conclusion**

The ZAB's approval of an MND and Use Permits for this project was inappropriate. I urge that the project be remanded to the ZAB for further consideration so that it has the opportunity to remedy these and the other deficiencies raised by the appellants. Alternatively, a public hearing would permit the project to be denied based on its clear procedural deficiencies.

Respectfully - Howie Muir

#### **\*23E.08.040 Design Review Standards,**

- A.** "Design review shall consider the design of a project in relation to its urban context, and shall focus on the application of the design guidelines referred to in this Ordinance and other guidelines written in conformance with the guidelines which are formally adopted by the Planning Commission."
- B.** "When conducting design review the Design Review Committee, the LPC, or staff shall use the design guidelines adopted by the Planning Commission as its official policy."
- C.** "The Design Review Guidelines, or any portion thereof, may be amended by the Commission. The Board may comment to the Commission on such amendments."
- D.** "The entity responsible for design review shall consider the conformance of the application to the standards set forth in and promulgated under this Ordinance, and may either approve, deny or modify an application for design review. However, no modification may be made that is not consistent with any other requirement of this Ordinance. (Ord. 6478-NS § 4 (part), 1999)"

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CITY OF BERKELEY  
CITY CLERK DEPT  
02 OCT 16 PM 1:01

RECEIVED  
OCT 16 2002  
CURRENT PLANNING

October 15, 2002

**BY HAND DELIVERY**

Honorable City Council MEMBERS  
c/o Sherry Kelly, City Clerk  
2180 Milvia Street  
Berkeley, CA 94703

RE: City Council Agenda for October 22, 2002  
Appeal of Zoning Adjustments Board Decision to Grant  
Use Permit No. 02-1000027

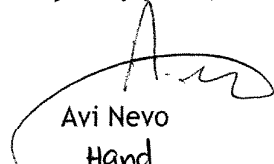
Honorable Councilmember:

I am the applicant under the above-referenced use permit application to build 65 new residential units, including 16 "inclusionary units" on a former Chevron site, which the Zoning Adjustments Board approved without objection after two public hearings and after an unprecedented five public hearings before the Design Review Commission. As you may know, Art Goldberg and Barry Wofsy appealed the ZAB's decision granting me a use permit. Previously, you and the ZAB have approved development of former gasoline station sites. Should you nevertheless deem the appellants' warmed over arguments opposing such new construction to be original, I would vigorously oppose them by once again presenting the scientific evidence that overwhelmingly rebuts their rhetorical claims regarding construction measures.

Currently, your agenda for October 22, 2002, includes your initial consideration of the use permit appeal. After confirming that neither the City Clerk nor the Zoning Official object, I respectfully ask that you postpone your initial consideration of the appeal until November 12, 2002 to accommodate my inconvenient family travel needs.

Thank you for your consideration and dedication to housing in Berkeley.

Very truly yours,



Avi Nevo

Hand

cc: Mark Rhoades, Zoning Official (by ~~fax~~)